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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. BRENT TAYLOR, Defendant and Appellant.	B189932 (Los Angeles County Super. Ct. No. LA049790)

APPEAL from a judgment of the Superior Court of Los Angeles County. Susan M. Speer, Judge. Affirmed in part and reversed and remanded with instructions.

Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

Brent Taylor appeals his conviction for one count of driving or taking of a vehicle, in violation of Penal Code section 10851. Before this court, appellant asserts the trial court erred in: (1) denying his motion for a mistrial based on the prosecutor's failure to disclose a witness' statement prior to the witness testifying at trial; and (2) denying his motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535 to discover evidence of complaints of misconduct involving one of the officers who arrested him. Any error with respect to the disclosure of evidence was adequately remedied by the court's admonition to the jury to disregard the evidence and the order striking it. In addition, Taylor has not demonstrated the circumstances surrounding presentation of this evidence or the court's efforts to cure any harm deprived him of a fair trial. Finally, he has not shown he suffered prejudice as a result. With respect to the *Pitchess* motion, however, the court erred in denying Taylor's request for the discovery of police officer records. As we shall explain, the information Taylor presented in support of the motion demonstrated the discovery sought could be material to his defense to the charges. Consequently, we reverse for the court to conduct an in camera hearing pursuant to *Pitchess.*

FACTUAL AND PROCEDURAL HISTORY

The underlying facts concerning the crime charged are as follows:

On August 7, 2007, at approximately 1:40 a.m. two Los Angeles Police Department Officers, Officer Amores and Officer Cruz were driving in their patrol car in an alley behind a supermarket and several other businesses in the San Fernando Valley. As they drove the officers noticed a small Toyota truck with two occupants driving in the alley. Officer Cruz ran a check on the license plate of the pickup and discovered the registered owner had an outstanding misdemeanor warrant.

The truck parked in a well-lit area near one of the stores and a male, later identified as Taylor, exited the driver's side of the truck. The passenger, a female later identified as Ms. B., remained in the pickup. Taylor walked toward the buildings. The officers stopped Taylor and asked him what he was doing in the area. Taylor told the officers he wanted to use the restroom. The officers pointed out the businesses were closed and that there had been a number of crimes committed in the area.[1] The officers then asked whether the truck he had been driving belonged to him, and Taylor initially responded he had not been driving the vehicle. He stated that Ms. B. was the driver. The officers indicated to Taylor that they had observed him exiting the truck, informed him of the misdemeanor warrant and again they asked if the vehicle belonged to him. Taylor told the officers the truck did not belong to him. The officers asked for Taylor's identification. Taylor said he did not have it, but he gave the officer's his identifying information and consent to search the truck.

When the police searched the vehicle they found a set of keys, which had been shaved to make them thinner, and an alarm activator.[2] Taylor stated he used the keys to start the truck. The alarm activator did not activate any alarm on the truck.

At some point, Taylor admitted he drove the truck. A further check of the license plate on the truck indicated the name of the owner did not match the names Taylor or Ms. B.[3] had given the officers. Taylor told police that the truck did not belong to him. Ms. B. denied the truck belonged to her.

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[1] A number of crimes had been committed in the alley.

[2] Officer Cruz testified "shaved" keys are often used to steal cars because they will fit the ignition of more than one vehicle.

[3] When Ms. B. was initially questioned by the police she gave them another name. She later told Officer Amores she lied about her identity because she knew she had an outstanding warrant under her name.

The officers detained Taylor and Ms. B. and another unit of police officers was dispatched to the address of the person listed as the registered owner of the truck. The officers went to the home of Giovani Francisco Soto-Chavez, who told the officers he owned the truck. Soto-Chavez told police that he had parked the truck about a half a block away from his apartment approximately a day or so before and had locked the vehicle and rolled-up the windows. Soto-Chavez had a set of keys to his truck. He did not know his pickup was missing until he took the officers to the location where he had parked it and saw it was gone. Soto-Chavez accompanied officers to the location of the truck and he identified it. He told police he did not know Taylor and did not give him permission to take his truck.

Taylor and Ms. B. were arrested. According to the police report, Taylor told Officer Cruz that earlier in the evening Ms. B. showed up at his apartment and had asked him to accompany her to the store. He stated that when they went outside he observed she had brought the truck to his apartment. Taylor admitted he had driven to the store. According to the police report, Ms. B. told Officer Amores she had just met Taylor earlier that morning and she was aware Taylor did not have a car. She told Officer Amores that at some point earlier in the evening she had walked over to Taylor's apartment and Taylor told her to stay in his room while he went downstairs to find a car for them to take to the store. She stated when she went outside she saw Taylor with the truck. She further told Amores that after they had been arrested and were at the jail (and no one else was around) Taylor "advised her to take the blame for the stolen vehicle."

Taylor was charged with one count of driving or taking of a vehicle, in violation of Penal Code section 10851, subdivision (a), and a number of prior convictions, including a strike conviction.

Officer Cruz and Soto-Chavez testified during the trial. Taylor proceeded on the defense he lacked the intent to deprive the victim of the vehicle and he did not know the truck was stolen. Taylor's counsel told the jury that Taylor had been driving the truck when the police approached him but he also stated Ms. B. had brought the truck to his apartment and he assumed the car belonged to her. Taylor argued there was no evidence

he knew the truck belonged to Soto-Chavez or that Soto-Chavez had not given his consent to drive the truck.

The jury found Taylor guilty. He admitted that he suffered the prior convictions and was sentenced to ten years in prison.

Taylor appeals.

DISCUSSION

I. The Trial Court Did Not Err in Denying Taylor's Mistrial Motion.

A. Factual Circumstances Prompting Taylor's Motion

During his testimony Soto-Chavez was asked by the prosecutor whether he noticed if anything was missing from the vehicle when the police took him to identify the truck. Soto-Chavez responded that nothing was missing but he found a bag containing screwdrivers in the truck and a black plastic bag in the bed of the truck, which did not belong to him. Taylor objected asserting the evidence was not relevant. The court overruled the objection and Taylor's counsel asked to approach the bench asserting a discovery violation. The court asked counsel to come to side bar. After an unrecorded discussion between the court and counsel, the court dismissed the jury for the day.

After the jury left, the court indicated on the record that during the side bar they discussed a "discovery violation." The defense stated it had not been given any information orally or in writing concerning the items Soto-Chavez stated he found in his truck. The court allowed the prosecutor to ask Soto-Chavez additional questions in an effort to lay a foundation for the evidence. During questioning Soto-Chavez testified he found a black plastic bag and a tool bag in the back of the truck and that inside the truck he found some screwdrivers. He reiterated that he had not left those items in the truck. He also stated he had first met the prosecutor that day shortly before he took the stand. Soto-Chavez testified that during his ten minute conversation with the prosecutor he

disclosed the items he had found in his truck. Soto-Chavez stated when the police asked him about the items he told the police that they did not belong to him. He testified that he did not take the bags and tools home with him when he took his truck; he thought the police had taken the screwdrivers and the bags as "evidence." After Soto-Chavez testified the court continued the proceedings to the next day.

The next day Taylor moved for a mistrial based on the prosecutor's failure to disclose Soto-Chavez's statements concerning the items found in the truck prior to Soto-Chavez taking the stand. Taylor argued the evidence was not relevant and the prosecutor had committed a discovery violation in not disclosing it. Taylor asserted he was denied due process rights to a fair trial because he did not have an opportunity to object to the testimony prior to it being presented. Taylor argued he should have been informed by the prosecutor that he planned to elicit the testimony from the witness so that Taylor could have been prepared for it, i.e., to discuss the relevance of the testimony beforehand and/or assert an objection to it outside the presence of the jury. He asserted that "it was prejudicial to the point where we really have no other solution other than to pick a new jury."

The prosecutor responded he conferred with Soto-Chavez after the court proceedings on the prior day and at that point Soto-Chavez had "vacillated"-- Soto-Chavez told the prosecutor he might have taken the screwdrivers home with him and was not sure what had become of the other items. The prosecutor said that Soto-Chavez remarked that perhaps when the officers spoke of the "evidence" they had taken from the truck they may have been referring to the shaved keys. The prosecutor further stated the officers said they did not have any recollection of any plastic bags and did not collect the items Soto-Chavez described. The officers stated there was a backpack or bag containing tools in the truck, but they did not take it into evidence because they assumed the bag belonged to Soto-Chavez as the vehicle looked like a work truck. They also did not recall seeing screwdrivers inside the truck.

The prosecutor suggested any harm resulting from the late disclosure of Soto-Chavez's testimony could be cured by an instruction to the jury to disregard the evidence.

After a further discussion between counsel and the court, the court stated that because it appeared the items described were never actually seized by the officers, the people did not have any obligation to disclose them. Taylor responded that even if that were the case, Soto-Chavez's statements concerning the items were evidence subject to discovery, if the prosecutor was proceeding on a theory that the testimony was relevant. Taylor argued that the prosecutor's solution would not cure the damage done because Taylor had been forced to make an objection in front of the jury, the court abruptly stopped the proceedings to conduct a sidebar and then dismissed the jury for the day. He argued that having heard the evidence the jury would wonder about its significance. Taylor argued that those circumstances introduced prejudice into the proceedings: "[t]he suggestion that there was an error prejudices the fairness of the trial . . . ."

The court stated it saw several possible solutions. Soto-Chavez could retake the stand to testify about the items, stating that he was not sure about them, in which case Soto-Chavez would be impeached. A second option would be to give the jury an instruction about the discovery violation. A third option would be to strike the evidence and instruct the jury not to consider it. The court noted that a final option would be to grant a continuance, though the court doubted that would serve any purpose because the evidence was not available. Taylor agreed with the court that a continuance would be pointless since the evidence did not exist.

The court and the parties then discussed whether the evidence was relevant. The prosecutor stated that he had planned to show the relevance of the items by eliciting testimony from the officers that screwdrivers are common burglar tools. However, the prosecutor also conceded that since the screwdrivers apparently could not be found, he would have no basis for eliciting that testimony and thus there was no relevance to Soto-Chavez's testimony concerning the items found in his truck.

The court declined the request to grant a mistrial. The court did not perceive any prejudice to Taylor as a result of the testimony. The court stated: "There is no bad faith here. It can be explained. It's not going to be used against the defendant. The officer's not going to testify that it's a burglary tool . . . [¶¶] He's not going to make any reference

to them. [¶¶] I don't see any real prejudice to the defendant. What is the prejudice if there is no testimony that the screwdrivers mean anything? How do we know they belong to the defendant? There's no fingerprints. Nothing to connect those screwdrivers to the defendant."

The court concluded that a discovery violation had occurred and thus decided that the appropriate remedy would be to give an instruction to the jury concerning the violation. In addition, the court also decided to strike Soto-Chavez's testimony concerning the items he found in the truck and instruct the jury to disregard it because the testimony was no longer relevant.

When proceedings resumed the court instructed the jury as follows: "Ladies and gentleman, I just need to instruct you that there was some testimony from Mr. Soto-Chavez yesterday regarding items of property in the bed of the Toyota truck as well as screwdrivers inside the cab of the truck. That was introduced in error. You are totally to disregard any testimony regarding those items that I just mentioned, you are not to let it enter into your deliberations in anyway."

The court later instructed the jury with CALCRIM No. 306, concerning the late disclosure of the evidence.[4]

B. Analysis of Taylor's Claims

Taylor's claims on appeal mirror those he asserted below. Specifically he claims the court should have granted the mistrial motion because the prosecutor's failure to

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[4] As read to the jury, CALCRIM No. 306 provided: "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. An attorney for the People failed to disclose: statements of witness Mr. Soto-Chavez regarding items of property found inside the cab and the bed of the Toyota truck, except for Exhibit No.1, within the legal time period. In evaluating the weight and significance of that evidence, you may consider the effect, if any, of late disclosure."

disclose Soto-Chavez's statements prior to him taking the stand deprived Taylor of the opportunity to object to the discovery violation outside the presence of the jury. He claims that had he been able to object to the testimony, the jury would never have heard it. Taylor asserts he was denied his due process right to a fair trial because he was denied a "reasonable opportunity to know the claims of the opposing party and to meet them." Taylor also maintains that: "the court's striking the testimony regarding the screwdrivers and bags . . . provided little if any relief from the damage already done. It is clear that the prejudicial effect of the late disclosure had a detrimental effect on the defense." A "mistrial was the only option that would have remedied the harm caused by the testimony." As we explain, we do not agree.

A mistrial motion should be granted only when the moving party's chances of receiving a fair trial have been irreparably damaged. (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.) "'"Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions ." [Citation.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1154; *People v. Cox* (2003) 30 Cal.4th 916, 953.) Therefore, we review a trial court's ruling on whether to grant a mistrial for abuse of discretion. (*People v. Ayala*, *supra*, 23 Cal.4th at pp. 282-283; *People v. Lewis* (2006) 39 Cal.4th 970, 1029.)

A criminal defendant has no general constitutional right to discovery. The duty to disclose information to the defense is dependent upon whether that obligation has a constitutional due process or statutory basis. As articulated by the United States Supreme Court in *Brady v. Maryland* (1963) 373 U.S. 83, the prosecution has a *sua sponte* obligation, pursuant to the due process clause of the United States Constitution, to disclose to the defense information within its custody or control which is *material* to, and *exculpatory* of, the defendant. (E.g., *Kyles v. Whitley* (1995) 514 U.S. 419; *In re Ferguson* (1971) 5 Cal.3d 525.) This constitutional duty is independent of, and to be differentiated from, the statutory duty of the prosecution to disclose information to the defense. (Pen. Code § 1054 et seq.; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378.)

The California statutory scheme, (adopted as part of Proposition 115 in 1990) Penal Code[5] section 1054.1 requires that the prosecution disclose specified information to the defense. Under section 1054.1, the prosecutor is required to disclose certain materials, if they are in the prosecutor's possession or the prosecutor knows them to be in the possession of the investigating agencies, including: (1) all relevant real evidence seized or obtained as a part of the investigation of the offenses charged. (§ 1054.1, subd. (c)); (2) any exculpatory evidence. (§ 1054.1, subd. (e)); and (3) relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial. (§ 1054.1, subd. (f).) The procedural mechanisms of the discovery statutory scheme (§ 1054 et seq.) are exclusive -- that is, the parties to a criminal proceeding may not use discovery procedures other than those authorized by chapter 10. (§ 1054.5, subd. (a).) However, the statutory scheme expressly permits discovery outside its terms, "as provided by . . . other express statutory provisions, or as mandated by the Constitution of the United States." (§ 1054, subd. (e).) Thus, a defendant maintains a right to discover material, exculpatory evidence under the due process clause of the Constitution. (§ 1054.1.)

Violation of section 1054.1 may result in imposition of sanctions. In ruling on discovery matters prior to, or during trial, the trial court has available the sanctions provided for by section 1054.5. Section 1054.5 provides, in pertinent part: "[u]pon a showing that a party has not complied with Section 1054.1 . . . a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure." (§ 1054.5, subd. (b).)

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[5] Further statutory references are to the Penal Code unless otherwise indicated.

On appeal to prevail on a claim of discovery violation on the grounds disclosure was required under *Brady*, the defendant must establish that the information not disclosed was exculpatory and that "'there is a reasonable probability that, had the evidence been disclosed . . . , the result of the proceedings would have been different.'" (*Kyles v. Whitley*, *supra*, 514 U.S. at pp. 433-434, quoting from *United States v. Bagley* (1985) 473 U.S. 667, 682, 685; *In re Brown* (1998) 17 Cal.4th 873, 886-887.) Evidence is material in the context of review of a discovery violation post-conviction if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Kyles v. Whitley*, *supra*, 514 U.S. at p. 435.) Post trial, under *Brady* and its progeny, we apply the "reasonable probability of different outcome" test. Such a "reasonable probability" exists where it is probable that the discovery violation is sufficient to undermine confidence in the outcome. (*Kyles v. Whitley*, *supra*, 514 U.S. at pp. 434-435; accord *In re Williams* (1994) 7 Cal.4th 572, 611-612.)

Concomitantly on appeal from a judgment of conviction on the grounds of violation of statutory discovery right (i.e., § 1054.1), the defendant must establish there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different.[6] (*People v. Bohannon* (2000) 82 Cal.App.4th 798, 806-807; *In re Brown*, *supra*, 17 Cal.4th 873, 886-887.) With these principles in mind we consider the circumstances in this case.

With respect to the prosecutor's obligations under *Brady*, we conclude that the prosecutor was not required to disclose Soto-Chavez's statements concerning the items in his truck as the evidence was not material, exculpatory evidence under the due process

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[6] Post-trial, the statutory remedies of section 1054.5 are no longer available. On timely pretrial review of an arguably erroneous ruling on a discovery issue, the Court of Appeal may fashion a remedy within the confines of the statute if the discovery principle has a statutory base, or as mandated by the due process clause of the federal Constitution if the right to be vindicated derives from the federal due process clause. (See *Izazaga v. Superior Court*, *supra*, 54 Cal.3d at p. 378.)

clause of the Constitution. Soto-Chavez's statements neither exculpated nor inculpated Taylor. In fact, as the trial court pointed out (assuming the evidence Soto-Chavez described even existed), there was no evidence linking Taylor to the items Soto-Chavez claimed he found in the truck. Thus we conclude the prosecutor did not violate *Brady*.

In terms of the prosecutor's discovery obligations under section 1054.1, Soto-Chavez's "statements" concerning the items he found in his truck disclosed to the prosecutor for the first time shortly before Soto-Chavez took the stand *arguably* are governed by section 1054.1, subdivision (f). It is not clear from the record before us, however, that Soto-Chavez's statements to the prosecutor were *written*, *recorded* or qualified as a *report of a statement* as described by subdivision (f). (§ 1054.1., subd. (f) ["Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial. . . ."].) Moreover, none of the other subdivisions of section 1054.1 would have mandated disclosure. The evidence was not exculpatory, does not relate to the identity or credibility of any witness, is not a statement of the defendant, and did not constitute "real" evidence seized or obtained as a part of the investigation of the offenses charged. (See § 1054.1.) Consequently, we cannot conclude with confidence that discovery of his statement was mandated by section 1054.1.

In any event, even were we to conclude as the trial court did, that disclosure of Soto-Chavez's statements was required prior to him taking the stand to testify at trial, the court ordered an appropriate remedy under section 1054.5.[7] The court struck the

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[7] Because the court had already ordered the jury to disregard the evidence, the court's instruction to the jury informing it of the discovery violation was both unnecessary and potentially confusing. Indeed on the one hand the court told the jury to "totally [ ] disregard [the evidence]" and "not to let it enter into your deliberations in any way." Thereafter the jury was later instructed pursuant to CALCRIM No. 306, that the prosecutor had failed to timely disclose statements of Soto-Chavez concerning the property he found in his pickup and that "[i]n evaluating the weight and significance of *that* evidence, you may consider the effect, if any, of that late disclosure." (Italics added.) This notwithstanding, we have no doubt that the jury understood that they were not to consider the statements in determining whether Taylor was guilty of the charge.

objectionable testimony and told the jury to disregard it. The jury is presumed to have followed the court's instruction to disregard the testimony. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852). We conclude this remedy cured any harm. Moreover, the objectionable testimony was brief, and the prosecutor was not permitted to use the evidence to pursue any theory of guilt. The trial court did not abuse its discretion by failing to grant appellant's motion for a mistrial.

Nonetheless, Taylor asserts the remedy applied was inadequate because it did not address the harm to his constitutional "due process" right to a fair trial. Taylor admits his due process claim is not premised on a violation of *Brady*. Instead, Taylor premises his federal "due process" claim on *United States v. Morgan* (1938) 304 U.S. 1, a case which concerns, in part, the right to a "full hearing" in the context of administrative proceedings. Taylor relies on language in *Morgan,* which provides that a "full hearing" must "afford a reasonable opportunity to know the claims of the opposing party and to meet them." (*Id.* at p. 18.) He claims that the prosecutor's failure to disclose this evidence prior to the jury hearing it had a devastating effect on his defense because it denied him the opportunity to object to the evidence outside the presence of the jury and to keep the jury from ever hearing it.

To the extent that this argument attempts to assert the existence of additional discovery obligations outside the confines of *Brady* and the state statutory scheme, we must reject it. As discussed elsewhere herein, all rights to discovery in criminal cases stem from *Brady* and/or Penal Code section 1054 et seq.

If on the other hand, his argument is intended to suggest that the remedy fashioned by the court—striking the evidence and ordering the jury to disregard it—is legally inadequate under the federal due process and fair trial standards, we cannot agree. Taylor has not demonstrated that brief reference to this evidence, his objection to it and the short break in the trial proceedings to address the matter, followed by the court's admonition to the jury to disregard it, caused irreparable damage to his case. Likewise Taylor has failed to show how his trial was fundamentally unfair because he did not have an opportunity to object to this evidence outside the presence of the jury and because he did not have the

opportunity to preclude them from hearing it in the first instance. This case is essentially no different from any other trial in which a party is caught unaware by the introduction of evidence that is ultimately excluded as irrelevant. That a party is surprised by the introduction of evidence (which is ultimately excluded as irrelevant) does not standing alone render a trial fundamentally unfair or undermine the confidence in the verdict. Unless the evidence by its very nature is so inflammatory or unduly prejudicial that its mere mention causes immediate and irremediable harm to the defendant, we believe that an order striking it and an admonition to the jury to disregard the evidence generally serves to cure the harm.

This evidence concerning the items Soto-Chavez found in the truck was not the type which might prejudice the jury. Nor was the evidence even linked to the defendant. It is simply not the type of situation which would render all efforts to remedy the damage futile.

Finally, in our view there is no reasonable probability that, had the evidence been disclosed to the defense prior to Soto-Chavez testifying and thereafter had Taylor been successful in excluding it, the result of the proceedings would have been different. We are not convinced that any error with respect to the court's resolution of this matter resulted in prejudice warranting reversal under the state or federal harmless error standards.

II. The Trial Court Erred in Denying the *Pitchess* Motion.

Prior to trial Taylor filed a discovery motion under *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531, seeking discovery of evidence of misconduct and citizen complaints from the personnel files of Officer Amores, the police officer who: (1) interviewed Ms. B.; (2) prepared the statement for her to sign; and (3) prepared the police report.

Specifically, the motion sought disclosure of information concerning any acts involving falsification of evidence, charges, or reasonable suspicion and/or probable cause, illegal search and seizure, false arrest, writing of false police reports to cover up the use of excessive force, false police reports, planting of evidence, perjury, aggressive behavior, racial or gender bias, ethnic bias, sexual orientation bias, coercive conduct, violation of constitutional rights, violence, excessive force or attempted violence or excessive force, false or misleading internal reports including false overtime or medical reports and any other evidence amounting to moral turpitude.

In support of the motion, Taylor's counsel filed a declaration of "cause," stating: "It is necessary that these materials be made available to the defendant in order to properly prepare this case for motions and trial. The requested discovery is material and relevant to the trial of this case (as well as any motions) and is necessary for the defense preparation for the following reasons:

"Mr. Taylor and his co-arrestee, [Ms. B.], were both arrested and charged with a violation of Vehicle Code section 10851, a crime commonly called joyriding. Statements were attributed to both defendants, although in neither case did Mr. Taylor or Ms. [B.] write a statement in his or her own hand. For both defendants, LAPD officers wrote out statements which were attributed to each defendant (Officer Amores (# 37065) is the officer who wrote out the statement attributed to Ms. [B.]); signatures on the statement forms are alleged to be those of Mr. Taylor and Ms. [B.] Officer Amores alleges both in the narrative portion of the arrest report and in the statement that he wrote out for Ms. [B.] that she claims that Mr. Taylor, in a moment of privacy between the two after their arrest, asked her to take the blame for riding in the stolen car.

"The defense avers that Ms. [B.] did not tell Officer Amores or any other LAPD officer that Mr. Taylor asked her to take the blame for the crime. On information and belief, the defense also avers that Mr. Taylor made no such statement to Ms. [B.]

"These materials would be used by the defense to locate witnesses to testify that the officer has a character trait, habit, and custom of engaging in misconduct of the type alleged in this case. These witnesses would also testify to specific instances of

misconduct of the type alleged in this case. This evidence would be admissible and relevant to show the officer has a propensity to engage in the alleged misconduct, and that the officer engaged in such misconduct in this case.

"Evidence that an officer has a habit, character, and custom to use excessive force is not only relevant to establish that a defendant's use of force against the officer was in self-defense. In addition, evidence of an officer's use of excessive force would be relevant to show that the officer has a habit, character, and custom to engage in misconduct amounting to moral turpitude. An officer who uses excessive force while on duty has engaged in morally turpitudinous conduct and may be impeached with that conduct.

"Such information would also be used by the defense to effectively cross-examine the officer at trial, and for impeachment purposes where appropriate. Additionally, such information would be used by the defense in the discovery of other admissible evidence."

At the hearing on the motion, the court stated that the declaration of cause did not "go far enough." The following exchange occurred between the court and Taylor's counsel:

"[Counsel]: If it's not unfair to ask what would be enough? Is it a declaration signed by [Ms. B.]?

"The Court: That would be the best way to go.

"[Counsel]: So it's not the information, per se.

"The Court: No. No. I mean, if -- certainly in this case the veracity of the officer is important because he's saying that another person who was in the car or another person who was arrested for this offense is pointing the finger at Mr. Taylor and asked her to take the blame for him.

"[Counsel]: What if I were to submit to the court, for obvious reasons -- this is easier – a declaration from Mr. Braga [the defense investigator] which would at least bring it to the same level as when I sign my declarations? Having spoken with someone directly, I sign my declarations and it -- it eliminates at least one level of quote, unquote, hearsay.

"The Court: Yeah. You know –

"[Counsel]: The middleman.

"The Court: Look, I know Ted Braga has good veracity. I've known him for 30-some-odd years.

"[Counsel]: I know the court isn't making the call based on credibility issues.

"The Court: Yeah. I think we're getting further and further from where we need to be and, under the circumstances at this time, I am going to deny the motion.

"[Counsel]: Okay.

"The Court: Of course it's done without prejudice and

"[Counsel]: If I –

"The Court: If you're able to, please do.

"[Counsel]: Okay."

On appeal Taylor asserts the court erred in denying his motion for discovery of police personnel records under *Pitchess* without conducting an in camera review of potentially discoverable records. We agree.

A *Pitchess* motion for discovery of peace officer personnel records is "addressed to the sound discretion of the trial court." (*Pitchess v. Superior Court*, *supra*, 11 Cal.3d at p. 535; *People v. Samayoa* (1997) 15 Cal.4th 795, 827.) This court reviews the lower court's ruling under the abuse of discretion standard. (*People v. Gill* (1997) 60 Cal.App.4th 743, 749.)

Under section 832.7, subdivision (a) peace officer personnel records, including complaints against officers for falsifying evidence, illegal searches and seizures, witness tampering and false arrest "are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to sections 1043 and 1046 of the Evidence Code. (§ 832.7, subd. (a).) Evidence Code section 1043 requires that a written motion be filed with the trial court and that it must describe the records sought and must include "affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation . . . ." (Evid. Code, § 1043, subd. (b)(3).)

To establish "good cause," requires a showing of "both '"materiality" to the subject matter of the pending litigation and a "reasonable belief" that the agency has the type of information sought.' [Citation.]" (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016 (*Warrick*).)[8] This two-part showing is a "'relatively low threshold for discovery."' (*Id.* at p. 1019.)

In *Warrick*, the California Supreme Court clarified the "materiality" element of good cause: "To show good cause as required by [Evidence Code] section 1043, defense

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[8] In *Warrick*, the defendant filed a *Pitchess* motion, seeking disclosure of citizen complaints against the arresting officers for making false arrests, falsifying police reports, or planting evidence. The defendant also sought extensive discovery concerning other alleged misconduct by the officers. (*Warrick, supra*, 35 Cal.4th at p. 1017.)

A police report indicated that officers were in an area known for violent crime and narcotics activities when they saw the defendant holding a clear plastic baggie containing off-white solids. When the officers exited their car, the defendant fled, discarding numerous off-white lumps resembling rock cocaine. One officer recovered 42 lumps from the ground, and other officers arrested the defendant after a short pursuit. The defendant possessed a small amount of cash, and vehicular burglary tools. (*Warrick, supra*, 35 Cal.4th at p. 1016.)

In support of the *Pitchess* motion, defense counsel submitted a declaration presenting the defendant's version of the events. In the declaration, the defendant denied possessing or discarding rock cocaine. According to him, he was in the area to buy cocaine from a seller who was present at the scene. When the officers exited the patrol car, the defendant fled because of an outstanding warrant, but was caught within moments. Other people were retrieving rock cocaine from the ground. Officers retrieved some of the rocks, and one officer, referring to a rock, told the defendant he must have thrown it. Defense counsel suggested the officers falsely claimed the defendant discarded the cocaine. The defendant, seeking to show that the officers falsely arrested him and fabricated the report, sought previous complaints against the officers for dishonesty. (*Warrick, supra*, 35 Cal.4th at p. 1017.)

The trial court denied the *Pitchess* motion, and an appellate court summarily denied the defendant's petition for a writ of mandate. Our Supreme Court granted review and transferred the matter to the appellate court with directions to issue an order to show cause why the defendant was not entitled to relief. (*Warrick, supra*, 35 Cal.4th at p. 1018.)

counsel's declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges. The declaration must articulate how the discovery sought may lead to relevant evidence or may itself be admissible direct or impeachment evidence [citations] that would support those proposed defenses. . . . [¶] Counsel's affidavit must also describe a factual scenario supporting the claimed officer misconduct. That factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report. . . . [¶] In other cases, the trial court hearing a *Pitchess* motion will have before it defense counsel's affidavit, and in addition a police report, witness statements, or other pertinent documents. The court then determines whether defendant's averments '[v]iewed in conjunction with the police reports,' and any other documents suffice to 'establish a plausible factual foundation' for the alleged officer misconduct and to 'articulate a valid theory as to how the information sought might be admissible' at trial. [Citation.]" (*Warrick*, *supra*, 35 Cal.4th at pp. 1024-1025.)

According to *Warrick*, the standard by which to judge whether the defendant's factual foundation is plausible is whether it "might or could have occurred." (*Id*. at p. 1026.)

The questions a court should ask to determine whether defense counsel has shown materiality are: "Has the defense shown a logical connection between the charges and the proposed defense? Is the defense request for *Pitchess* discovery factually specific and tailored to support its claim of officer misconduct? Will the requested *Pitchess* discovery support the proposed defense, or is it likely to lead to information that would support the proposed defense? Under what theory would the requested information be admissible at trial? If defense counsel's affidavit in support of the *Pitchess* motion adequately responds to these questions, and states 'upon reasonable belief that the governmental agency identified has the records or information from the records' (§ 1043, subd. (b)(3)), then the defendant has shown good cause for discovery and in-chambers review of potentially relevant personnel records of the police officer accused of misconduct against the defendant." (*Warrick*, *supra*, 35 Cal.4th at p. 1027.)

In the instant case the basis for the court's decision denying the motion is not entirely clear. It does appear, however, the denial was based at least in large measure on the court's belief that counsel's declaration was insufficient. The court's comments at the hearing suggest that counsel's claims (i.e., Taylor did not make certain statements to Ms. B. and Ms. B. did not repeat those statements to Officer Amores) required a corroborative declaration either from Ms. B. or the defense investigator. Such "'collateral supportive evidence" and/or "a witness account corroborating the occurrence of officer misconduct" is, however, the very evidence *Warrick* expressly stated was *not* required. (*Warrick*, *supra*, 35 Cal.4th at pp. 1022, 1025.)

"While section 1043 requires that good cause be shown by affidavits, there is no requirement the affiant have personal knowledge of the matters stated in the declaration, which may be based merely on information and belief." (*Brant v. Superior Court* (2003) 108 Cal.App.4th 100, 105.)[9] Thus, a declaration from defendant's counsel is sufficient. (*People v. Memro* (1985) 38 Cal.3d 658, 676.) The materiality of the requested information may be established by a reading of the police reports in conjunction with defense counsel's affidavit. (*City of Santa Cruz* (1989) 49 Cal.3d 74, 85-86.) Consequently, this reason does not support the trial court's denial of the motion. As we shall explain the trial court should have granted the motion, at least in part.[10]

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[9] We note counsel's statement of "information and belief" is tied to the statement that Taylor denied asking Ms. B. to take the blame for the stolen vehicle. The phrase "information and belief" does not preface the specific allegation that Ms. B. did not tell Officer Amores Taylor asked her to take the blame for the crime. We do not believe, however, the court denied the motion for that reason; in our view the court would have denied the motion even if counsel had inserted the phrase "information and belief," in both sentences.

[10] Taylor's request was overbroad to the extent it requested anything other than evidence relating to complaints of fabrication of police reports or evidence, perjury and arguably any matters relating to issues of officer veracity. While evidence presented in connection with the motion and the factual scenario described therein do not support the disclosure of any information concerning the other categories of alleged officer misconduct, the court could properly limit the matters to be considered.

The Attorney General argues, as did the People below, the motion was properly denied because the information and assertions in Taylor's counsel's declaration were insufficient to establish the materiality of Officer Amores' personnel records under the minimum standards articulated in *Warrick*. We do not agree.

Under *Warrick*, the defense counsel's declaration must propose a defense to the pending charges and the evidence sought to be discovered must support the defense. (*Warrick, supra*, 35 Cal.4th at pp. 1024, 1027.) Here counsel's declaration generally stated the evidence would be necessary to assist in trial preparation and would be relevant and material to show that the officer engaged in misconduct and also used to cross-examine and impeach the officer at trial. While counsel's declaration did not identify a specific defense to the charges, Taylor's defense can easily be gleaned from other materials that counsel submitted to the trial court, specifically the police report. His "defense" as articulated in the police report was not a complete denial of all involvement in the crimes. Instead, Taylor told police (and later the jury) that he was not guilty of the crimes because he lacked the requisite criminal intent. Specifically he stated that Ms. B. brought the car to his apartment and he did not know the truck was stolen when he drove it. Nearly every statement attributed to Taylor in the police report was consistent with this defense. The one possible exception is the statement Officer Amores attributed to Ms. B., in which she stated that Taylor allegedly requested that she take "the blame" for the stolen vehicle. On the one hand this statement could be viewed as Taylor urging Ms. B. to tell the truth and take responsibility for her actions--to admit to the police that she was the one responsible for the stolen vehicle. Under this scenario, the statement is actually helpful to Taylor's defense, and thus Taylor would have no need to discover the evidence sought in the *Pitchess* motion because the discovery sought would not have bolstered Taylor's defense.

However, it is equally plausible the statement that Ms. B. attributed to Taylor could be viewed as incriminating Taylor. A request by Taylor for Ms. B to "take the blame" could be perceived as entirely inconsistent with his position that it was Ms. B. alone who knew how she had obtained the vehicle; it would undermine his claim that he

did not know the car was stolen because if he were innocent there would be no reason to ask Ms. B to "take the blame." Thus the discovery Taylor sought in an attempt to demonstrate that Officer Amores' statements were not credible, and were not based on actual events, would support Taylor's defense that he lacked the requisite intent to commit the charged crimes. Impeaching Officer Amores would have bolstered Taylor's claim that he did not know the car was stolen.

At bottom, either of these interpretations of the "take the blame" statement is plausible. Thus, given that *Warrick* lowered the threshold of what must be shown to obtain discovery under *Pitchess*, we conclude Taylor's showing met the minimum necessary to establish "a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events". (*Id.* at p. 1021.) Consequently, the trial court erred in denying the motion without conducting an in camera hearing.

DISPOSITION

The judgment is reversed and the matter remanded to the trial court to conduct an in camera hearing, and further proceedings consistent with this opinion. Should the hearing reveal no information subject to discovery, the judgment shall be reinstated.

We affirm the judgment in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WOODS, J.

We concur:

PERLUSS, P.J. **ZELON, J.**